

The January 21, 1994, Order of Administrative Law Judge George R. Robertson denies benefits to claimant on the basis that claimant did not meet his burden of proof on the issue of whether the injury arose out of and in the course of his employment. Claimant

appeals that finding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board has jurisdiction pursuant to K.S.A. 44-551 and K.S.A. 44-534a to consider this appeal from a preliminary order. Respondent has asserted and the Administrative Law Judge has found that claimant failed to prove by a preponderance of the credible evidence that claimant suffered accidental injury arising out of and in the course of his employment. Whether the injury arose out of and in the course of the employee's employment is one of the specifically enumerated issues considered jurisdictional and subject to review by the Appeals Board pursuant to K.S.A. 44-534a.

After consideration of the arguments made and review of the evidence presented, the Appeals Board agrees with the decision of the Administrative Law Judge and finds for purposes of preliminary hearing claimant has failed in his burden of proving his accidental injury arose out of and in the course of his employment with the respondent.

Claimant alleges that he was injured on September 21, 1993, while building a carriage which was a part of his everyday job duty. While lifting it out of the jig he "heard some crunching in my back, it wasn't popping, it was crunching." Claimant testified that he notified his foreman, Rowland Bosker, shortly after the accident. He specifically recalls telling him "I wouldn't be surprised if I crunched some vertebrae, I'm hurting pretty bad." Claimant further testified that a co-worker, Keith Cowden, was standing nearby and heard this conversation. Approximately a week later the claimant was terminated by the president of the company, Bruce Anderson. During this conversation, and after he had been advised of his termination, claimant informed Mr. Anderson that he had a work related injury and that he could expect a claim from him for that injury. Claimant never asked to be provided medical treatment nor did he seek medical treatment until October 26, 1993.

The deposition of Rowland Bosker was taken on behalf of the respondent and insurance carrier. When asked whether he recalled a conversation with claimant about ten o'clock the morning of September 21, 1993, whereby claimant advised him that he had crunched his back, Mr. Bosker answered that he could recall no such conversation. He did recall that both Eldon Thompson and his co-worker, Keith Cowden, were working on carriages during that period of time which is heavy work and that they both complained of soreness at the end of the day. However, he has no recollection of claimant ever advising him that he had crunched his back or otherwise reporting any specific injury.

The testimony of the co-worker, Keith Cowden, was also introduced. At the time of his deposition Mr. Cowden was off work himself due to a work related injury for which he was receiving workers compensation benefits. He was asked whether he recalled a conversation between claimant and Rowland Bosker whereby claimant informed Mr. Bosker that he had injured his back while lifting. He did not recall any such conversation. Although he likewise recalled complaints of soreness, he had no recollection of claimant ever mentioning a back injury on September 21. He was not aware of claimant ever having injured his back at work.

Finally there was the testimony of Bruce Anderson, president of Auto Lifters of America, the respondent herein. He testified that his first knowledge of claimant alleging a back injury came on September 27, 1993, after informing claimant that his employment with Auto Lifters was being terminated. After being so informed claimant stated that he had hurt his back at work. Nothing was said about medical treatment, none was requested

and none was offered.

This case turns primarily on the credibility and believability of the witnesses. The Administrative Law Judge had the opportunity to observe the claimant testify, and he denied benefits. The testimony of claimant's co-worker and supervisor do not support claimant's claim of an incident on September 21, 1993, which resulted in injury to his back. There is no testimony that claimant missed work due to this injury, nor that claimant sought medical treatment through his employer. In fact, it was not until approximately one month after claimant was terminated from his employment with the respondent that he first sought medical treatment.

K.S.A. 44-501(a) states in part:

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

The Appeals Board is charged with reviewing and weighing the evidence in performing a de novo review. In so doing, the Appeals Board is entitled to and does give some weight to the fact that the Administrative Law Judge has had the opportunity to observe claimant's testimony. See e.g., Kroger Co. v. Morris, 14 Va. App. 233, 415 S.E.2d 879 (1992); Gale v. Hefty's Corp., 46 Or. App. 809, 613 P.2d 108 (1980). After observing claimant's testimony in this case, the Administrative Law Judge denied benefits. In light of that fact, and based upon the Appeals Board's review of the record as a whole, the Appeals Board concludes that claimant has failed to meet his burden of establishing that he suffered accidental injury arising out of and in the course of his employment. Accordingly, the decision of the Administrative Law Judge is hereby affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge George R. Robertson dated January 21, 1994, is hereby affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Randy S. Stalcup, 2831 E Central, Wichita, Kansas 67214
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